

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In The Matter Of)	
)	MB Docket No. 08-90
Sponsorship Identification Rules)	
And Embedded Advertising)	

COMMENTS OF STARZ ENTERTAINMENT, LLC AND OVATION, LLC

Starz Entertainment, LLC (“Starz Entertainment”) and Ovation, LLC (“Ovation”) submit these comments in response to the Commission’s Notice of Inquiry and Notice of Proposed Rulemaking in this proceeding.¹ The Commission should neither expand the broadcast sponsorship identification requirements nor apply such requirements to cable programming services or theatrical motion pictures. The product placement practices prevalent in the cable programming and motion picture industries are not deceptive to viewers and contribute to the development of new programming and movies. In any event, existing laws and regulations are sufficient to address any false or deceptive advertising in the form of product placements.

INTRODUCTION

The Notice seeks comment on a wide variety of issues relating to the regulation of product placements in broadcast television programs, cable programs and movies. Starz Entertainment and Ovation produce and/or distribute cable television programs and movies and

¹ See *In the Matter of Sponsorship Identification Rules and Embedded Advertising, Notice of Inquiry and Notice of Proposed Rulemaking*, 23 FCC Rcd. 10682 (2008) (“Notice”).

oppose expansion of the broadcast sponsorship identification rules to cable programming and theatrical movie releases.

A. Starz Entertainment, LLC

Starz Entertainment distributes premium movie networks and programming to cable, direct-to-home satellite, telephony, the Internet, and other distribution media in the United States. Starz Entertainment's principal service offerings consist of: (1) Starz, which primarily is a first-run movie service that generally includes Starz and five multiplex channels, each of which exhibits movies targeted to a specific audience; and (2) Encore, which airs first-run movies and classic contemporary movies and generally includes six additional thematic multiplex channels, each of which exhibits movies based upon individual themes.²

B. Ovation, LLC

Ovation distributes *Ovation TV*, which is the only programming service dedicated to the arts. With a mission to "make life creative," Ovation TV provides a multi-platform network offering original and acquired programming devoted to art, culture and personal creativity. As the destination for all things art, Ovation TV appeals to a multi-generational audience. Ovation TV's primetime programming features a different theme each night -- performance, people, visual arts, music and film -- with weekends devoted to original and event programming. The network offers the world's greatest artists in theater, dance, opera, literature, film, visual and fine art, music, design, photography and architecture. In addition to original programming, Ovation TV features programming from its extensive library

² Starz Entertainment's services also include: (1) Movie Plex, a "theme by day" channel featuring a different thematic multiplex channel each day on a weekly rotation; (2) Indie Plex, featuring art house and independent films; (3) Retro Plex, featuring classic movies; (4) Starz on Demand; (5) Encore on Demand; (5) high definition feeds of several Starz Channels; and (6) high definition versions of both Starz on Demand and Encore on Demand. Starz Entertainment also offers Starz Play, an Internet complement to Starz, to cable and telephone companies and other distributors who offer high speed services. Starz Entertainment has 16.8 million Starz subscribers and 31.4 million Encore subscribers.

of high caliber programming from major studios, arts education organizations and other sources from around the world.

I. Product Placement Contributes to Development of Cable Programming Services and Theatrical Films and Does Not Deceive Viewers.

Product placement dates to the earliest broadcast television shows, “with the hosts of popular shows such as Milton Berle’s *Texaco Star Theater* (1948-1953), *The Alcoa Hour* (1955-57), and *Mutual of Omaha’s Wild Kingdom* (1963-) promoting the sponsor’s products.” See *Comments of the Washington Legal Foundation to the Federal Communications Commission Concerning Television Product Placement*, Apr. 6, 2004, at 3. In the theatrical film industry, products placed in films over the years, such as the Reese’s Pieces candy in *E.T.*, “have helped convey images and impressions now inextricably linked in the minds of viewers to the films themselves.” See *Opposition to Petition for Rulemaking Related to Disclosure of Product Placement in Television*, Freedom to Advertise Coalition (“FAC”), Nov. 12, 2003, at 4-5 (“FAC Opposition”). In short, product placement has contributed to the development of television programming and movies since their inception.

The use of product placements in the cable programming and theatrical film industries is not deceptive to viewers. Viewers of cable programming and movies containing product placements “know that they are simply watching fictional programming,” not substantive discussions of the benefits of the products that appear in the programs. See FAC Opposition at 3. In fact, the typical “product placement” consists of little more than the appearance of the product at some point during the program, devoid of any description, endorsement or promotion of the positive aspects of the product.

The Federal Trade Commission ("FTC") noted this characteristic of product placements in rejecting a request for investigation of television product placement filed by Commercial Alert ("Commercial Alert Petition") just three years ago. The Commercial Alert Petition asserted that product placement may deceive consumers by blurring the line between advertising and programming and that the failure to disclose advertiser payments for product placement violated Section 5 of the Federal Trade Commission Act. *See* Letter from Mary K. Engle, Associate Director for Advertising Practices, Federal Trade Commission, to Gary Ruskin Executive Director, Commercial Alert (Feb. 10, 2005) ("Engle Letter"), at 1.

The FTC rejected Commercial Alert's contention that product placement practices deceive consumers:

Despite the variety and frequency of product placement and brand integration into programming, your complaint does not suggest that product placement results in consumers giving more credence to objective claims about the product's attributes. Indeed, in product placement, few objective claims appear to be made about the product's performance or attributes. That is, in most instances the product appears on-screen (e.g., American Idol hosts are seen drinking from cups with the Coca Cola logo), or is mentioned, but the product's performance is not discussed. Therefore, the rationale for disclosing that an advertiser paid for a product placement (i.e., that consumers will give more credence to objective claims about a product's attributes when made by a party independent from the advertiser), is absent. If, through product placement, false or misleading objective, material claims about a product's attributes are made, the Commission can take action against the advertiser through an enforcement action pursuant to Section 5 of the FTC Act. Accordingly, a rule or guide requiring an "advertisement" disclosure is not warranted under Section 5. Moreover, given the fact-specific nature of the deception analysis under Section 5, a one-size-fits-all rule or guide would not be the most effective approach to addressing any potential for deception in some form of product placement.

See Engle Letter at 3 (notes omitted).

In rejecting the Commercial Alert Petition, the FTC also determined that "the existing statutory and regulatory framework provides sufficient tools for challenging...deceptive acts or

practices” that may occur in the form of product placements. *See* Engle Letter at 5-6. The Commission should not adopt more restrictive product placement regulations to address a problem that either does not exist or can be remedied by application of existing statutes and regulations without infringing on the First Amendment rights of program and movie creators or reducing or eliminating sources of funding for the development of new programs and movies.

II. The Commission Should Not Extend the Sponsorship Identification Requirements to Cable Programming Services and Should Continue to Waive the Application of the Requirements to Feature Films.

A. Cable Programming Services

The sponsorship identification requirements of the Communications Act originally addressed “situations where payments were made to *licensees* in return for broadcast exposure.” *See In the Matter of Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s Rules*, 34 F.C.C. 829, 831 (1963) (emphasis in original). “Questionable practices...disclosed in the broadcast industry,” such as “payola,” led Congress to adopt further revisions to the requirements. *Id.* at 830. Thus, a broadcaster is required by Section 317 of the Act to make a sponsorship announcement whenever the station receives “valuable consideration” for broadcasting particular content and they are required by Section 507 of the Act to make a similar announcement whenever they learn that consideration was paid “in exchange for the inclusion of matter in a program regardless of where in the production chain the exchange takes place.” *See* 47 U.S.C. §317; *Notice* at ¶4.

However, the sponsorship identification requirements of the Communications Act and the Commission’s rules apply only to “origination cablecasting,” not to other cable programming services. *See Notice* at ¶5 n.22. Origination cablecasting is defined as

“[p]rogramming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator.” See 47 C.F.R. §76.5(p). In a 1975 amendment to the sponsorship identification rules, the Commission expressly noted that the rules apply to “cable television systems insofar as they engage in origination cablecasting.” See *Amendment of the Commission’s “Sponsorship Identification” Rules (Sections 73.119, 73.289, 73.645, 73.789 and 76.221)*, 52 F.C.C. 2d 701 (1975), at ¶2 n.2.³ In fact, the Commission expressly noted that Section 507 of the Act “is not reflected in a rule applicable to cable programming, and its provisions do not apply to cable programming.” See *Notice* at ¶5 n.22. Given the nature and number of national and regional cable programming services, it would be unduly burdensome to impose sponsorship identification requirements upon cable operators beyond the origination cablecasting that they control.

B. Theatrical Films

The Commission’s rules waive the sponsorship identification requirements for “feature motion picture film[s] produced initially and primarily for theatre exhibition.” See 47 C.F.R. §§73.1212(h) (broadcast programming) and 76.1615(g) (cable origination programming). In the original (and extensive) rulemaking proceeding in which the Commission decided to waive the application of the sponsorship identification requirements to feature films, the Commission made the following determinations:

- The Commission’s “prior experience” with the “administration and enforcement” of the sponsorship identification requirements “contains

³ In a recent enforcement action involving violations of the sponsorship identification requirements by an affiliated regional cable network operated by Comcast Corporation, the Enforcement Bureau declined to “revisit” the Commission’s “conclusion” that the requirements “apply to origination programming by cable operators,” and not to programming services. See *Comcast Corporation, Notice of Apparent Liability for Forfeiture*, 22 FCC Rcd. 17474 (Enforcement Bur. 2007), at ¶5 n.8.

nothing which would indicate that the theatrical motion picture industry has engaged in practices" which the Commission "felt to be contrary to the public interest...and to be in direct opposition to the right of the public to know the identity of those who are attempting to persuade it...."

- The Commission found "no public interest considerations which would dictate the immediate adoption" of sponsorship identification requirements for theatrical films.
- The Commission found "no evidence" tending to establish theatrical film product placement practices "improperly affect broadcasting."
- The time lag between feature film production and later television exhibition reduces the "likelihood" of improper feature film product placement efforts.

See In the Matter of Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules, Report and Order, 34 F.C.C. 829, 841-42 (1963).

In 1992, the FTC reached a similar conclusion regarding feature film product placement. The Center for the Study for Commercialism ("CSC") petitioned the FTC "to order motion picture companies to stop using undisclosed product placement in movies, and require production studios to disclose paid for product placements at the beginning of any film containing them...." *See FTC Denies CSC's Petition to Promulgate Rule on Product Placement in Movies*, FTC File No. P914518, Press Release, Dec. 11, 1992. However, the FTC found "an apparent lack of a pervasive pattern of deception and substantial consumer injury attributable to product placements" and therefore determined that "an industry-wide rulemaking [was] inappropriate." *Id.* Again, there is no reason for the Commission to adopt a new regulatory scheme applicable to feature films -- or to their distribution via the cable programming services provided by Starz Entertainment and Ovation -- to address a problem

that either does not exist or is adequately addressed through enforcement of existing statutes or regulations.

CONCLUSION

Starz Entertainment and Ovation submit that the extension of the sponsorship identification requirements to cable programming services and theatrical films would provide a constitutionally questionable solution to a phantom problem. Product placements in cable programming and motion pictures do not deceive or mislead viewers and help program and movie producers convey their ideas and fund their creations.

Respectfully submitted,

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/S/

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